Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; and C. RICHARD ENGLISH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. SHOULD THIS COURT RULE FOR THE FIRST TIME THAT AN OFFICIAL GOVERNMENTAL POLICY OR CUSTOM WHICH ROUTINELY DISPENSES WITH THE IN-PERSON PRESENCE OF A PERSON ARRESTED WITHOUT A WARRANT VIOLATES THE U.S. CONSTITUTION?

2. DOES THE FOURTH AMENDMENT COMPEL RELEASE OF A PERSON HELD IN CUSTODY AND AWAITING FURTHER HEARING OR TRIAL WITHIN 48 HOURS OF THE TIME OBJECTIVE PROOF OF INNOCENCE IS DISCOVERED?

3. WHEN A PERSON IS ARRESTED WITHOUT A WARRANT ON A CHARGE OF POSSESSION OR SALE OF A CONTROLLED SUBSTANCE, DOES FAILURE TO PERFORM A CONFIRMATORY CHEMICAL TEST WITHIN A REASONABLE TIME RESULT IN A FOURTH AMENDMENT SEIZURE?

4. SHOULD ACTIONS BROUGHT AGAINST A STATE'S ATTORNEY IN HIS OFFICIAL CAPACITY BE REMANDED FOR REINSTATEMENT IF THIS COURT ANSWERS THE FIRST QUESTION IN THE AFFIRMATIVE?

PARTIES TO THE PROCEEDINGS

The only parties in this matter, both in the United States District Court and in the United States Court of Appeals for the Seventh Circuit were:

Plaintiff: RAPHAEL GARCIA

Defendants: MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; C. RICHARD ENGLISH, ACTING EXECUTIVE DIRECTOR, COOK COUNTY DEPARTMENT OF CORRECTIONS; CITY OF CHICAGO. ANNA GALL and COUNTY OF COOK were Defendants in the trial court. All claims against them were dismissed in the trial court, and they are not parties to this appeal. Some claims against CITY OF CHICAGO were settled in the trial court, but CITY OF CHICAGO is a party to this appeal.

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CITATIONS TO OPINIONS BELOW

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JURISDICTIONAL STATEMENT

The court's jurisdiction is invoked pursuant to 28 USC 1254. The Court of Appeals opinion was filed on May 19, 1994. Plaintiff filed a timely Petition for Rehearing which contained a suggestion for rehearing en banc. The Petition was denied August 15, 1994. The present Petition is timely, pursuant to 28 USC 2101 (c) and Supreme Court Rules 13.1 and 13.4, since the time for filing this Petition runs from August 15, 1994 when the Petition for Rehearing was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue. but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

At all times in question in this case, the following statute of the State of Illinois was codified as CHAPTER 38, SECTION 109-1, ILLINOIS REVISED STATUTES. It has since been recodified as 725 ILCS 5/109-1, with the ILCS standing for "Illinois Compiled Statutes".

§ 109-1. Person arrested. (a) A person arrested with or without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, except when such county is a participant in a regional jail authority, in which event such person may be taken to the nearest and most accessible judge, irrespective

of the county where such judge presides, and a charge shall be filed. Whenever a person arrested either with or without a warrant is required to be taken before a judge, and such person is in a different building than the building in which the judge is located, a charge may be filed against such person by way of a two-way closed circuit television system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.

(3) Schedule a preliminary hearing in appropriate cases; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

(c) The court may issue an order of protection in accordance with the provisions of Article 112A of this Code.

STATEMENT OF THE CASE

On March 15, 1991, Officer Anna Gall arrested Garcia. (R. 259) Officer Gall showed Garcia a small plastic bag containing white powder that she said she had recovered near his feet. (R. 261) Garcia at that time verbally denied the bag was his or that he ever had it or any similar bag. He alleged he had never been a user or seller of cocaine or of any controlled substance. (R. 261) Garcia's position was that this was a "drop" by Officer Gall to maintain control over Garcia. (R. 265) During the arrest, Officer Gall struck Garcia in the head with her flashlight while he was handcuffed wrist to wrist behind his back (R. 259)

After Garcia's arrest, Chicago Police Department personnel transported him to St. Mary of Nazareth Hospital, where he was admitted. (R. 260) He was held under 24-hour police guard handcuffed to his hospital bed. The officers who guarded him on March 15, 1991, were Chicago Police Officers. From March 16 through March 20, 1991, Garcia was guarded by personnel of the Cook County Sheriff's office. (R. 61, 260) On March 16, 1991, while Garcia remained in the hospital, a probable cause hearing was held before Judge A.C. Cunningham of the Circuit Court of Cook County. (R. 262) Officer Gall had signed a "Complaint for Preliminary Examination" charging that Garcia was knowingly in possession of cocaine, but otherwise reciting no facts indicating why the substance was cocaine. (R. 210, 262) Officer Gall did

not taste or otherwise test the substance before signing the complaint. (R. 262) Officer Gall did not otherwise testify at the hearing. (R.278-279) Judge Cunningham made a finding of probable cause based on the "signed and sworn police report". The Public Defender was appointed as counsel for Garcia, who stated she had no opportunity to interview him, and asked for a "reasonable bond". (R. 278) The prosecuting attorney stated that Garcia was on two years probation for "possession stolen motor vehicle and burglary." and requested "leave to file a Violation of Probation". (R. 278) Such a Petition was filed, but probation was not expressly revoked (R. 289). No bail was allowed, and Judge Cunningham set bond at $10,000 for possession of a controlled substance, and $25,000 for violation of

probation (R. 278-79) and the case was continued to March 18, 1991.

On March 18, 1991, the case was called before Judge Oliver M. Spurlock of the Circuit Court of Cook County. The prosecuting attorney and public defender were present. The clerk stated: "In custody, Raphael Garcia." On motion of the prosecutor, the case was continued to April 10, 1991. That constituted all the proceedings on that date. (R. 281-282) On March 20, 1991, Garcia was released from the hospital, and transported by personnel of the Sheriff's office to Cook County Jail and incarcerated there where he remained until April 15, 1991 (R. 62) when he appeared in court for the first time. (R. 284-290)

The "white powder" substance which Officer Gall claimed she found near

Garcia's feet was sent to a Chicago Police Department laboratory for testing. The Chicago Police Department rarely if ever performs "field tests" on a substance suspected to be cocaine (R. 271) The Department instead conducts tests to determine the presence of cocaine at its central laboratory, and such tests commonly take ten to twenty days to perform (R. 271) The laboratory does not perform tests faster upon suspected narcotics taken from arrestees who remain incarcerated than it does for arrestees who have posted bond. (R. 274) The laboratory personnel who perform the tests to determine the presence of cocaine have no way of knowing whether a specific person from whom the substance being tested was allegedly taken is or remains incarcer-

ated while the test results are being awaited and also have no way of knowing in the event of a negative test result whether the test result should be conveyed to the office of the State's Attorney or the Public Defender on a rush basis. (R. 271)

At the time of Garcia's arrest, a field test kit known as a "cobalt thiocyanate spot test" was commercially available. (R. 270) This test kit is inexpensive and easy to use. If such a test had been available at the police station to which Garcia was taken, it would have confirmed within 1 1/2 hours that the white powder allegedly seized from him was not cocaine. (R. 270)

On March 26, 1991, the Chicago Police Department laboratory tested the powder allegedly found near Garcia's

feet, and found it to be negative for any controlled substance. (R. 262)

At a hearing on April 10, 1991, before Judge Mary Maxwell Thomas of the Circuit Court of Cook County, the criminal charges against Garcia were nolle prossed. (R. 263) On April 12, 1992, Judge Thomas entered an order reinstating the plaintiff's probation status. (R. 263) Garcia was released from Cook County Jail on April 15, 1991, after appearing before Judge Thomas that day. (R. 259-261)

ARGUMENT

I. A DELIBERATE POLICY OF DISPENSING WITH THE PERSONAL APPEARANCE OF THE ARRESTEE AT A PROBABLE CAUSE HEARING SHOULD BE DECLARED TO BE A VIOLATION OF THE FOURTH AMENDMENT

This court should grant review in this case because of an issue of pressing importance in the law of arrest and detention which has never been ruled on by the court.

Petitioner, Raphael Garcia ("Garcia") alleged that his probable cause hearing took place the day after his arrest at a time when he was in a hospital under guard by deputies of the Sheriff of Cook County and handcuffed to his bed.

In County of Riverside v. McLaughlin, 111 SCt 1621 (1991) the Supreme Court was able to decide the case without reaching the issue of whether an in-person appearance before a judicial officer of a person arrested without warrant was a constitutionally indispensable requirement. By contrast, in McLaughlin v. County of Riverside, 888 F2d 1276 (9th Cir 1989), the Ninth Circuit held that the Fourth Amendment does not grant warrantless arrestees a right to attendance at a probable cause determination. As will be pointed out later, two other circuits have agreed with the Ninth Circuit. So at present the law as articulated in lower federal court decisions is that no in personam appearance of the arrestee is required.

In McLaughlin, the Supreme Court held that jurisdictions providing a probable cause determination within 48 hours of a warrantless arrest are immune from systematic challenges. Detention for more than 48 hours without such a hearing is presumed excessive and may only be justified by "a bonafide emergency or other extraordinary circumstance." (111 SCt at 1670) The quoted language seems to underscore the importance which the Supreme Court places on such a hearing. But does the hearing require the actual physical presence of the arrestee unless an "emergency or extraordinary circumstance" excuses it? That is the question presented in this appeal. This issue is sufficiently important so that, in granting review in this case, at least the Supreme Court can consider and contemplate the prob-

lems which surround the absence of the arrestee at a probable cause hearing.

In Gerstein v. Pugh, 420 US 103, 95 SCt 854 (1975) the Supreme Court held that the Fourth Amendment requires a judicial determination of proximate cause as a prerequisite to extended restraint of liberty following arrest, unless the arrest is supported by a warrant or a grand jury indictment. The rationale is that a warrantless arrest is justified by fear that without immediate detainment the suspect might flee. Once the suspect is in custody, there is no justification for dispensing with a neutral judicial officer's determination of probable cause. (420 US at 113-14) A probable cause determination "is required only for those suspects who suffer restraints on liberty other than

the condition that they appear for trial." (420 US at 125 N. 26) The Supreme Court has clearly stated that a Gerstein hearing is not required to be conducted in a fully adversarial fashion, but may be relatively informal, with both hearsay and written testimony admissible. (420 US at 120-122) Gerstein stated that the "sole issue" at such a hearing is whether there is probable cause to believe that the suspect commited an offense. (420 US at 120-121) This is interpreted literally by commentators. 82 GEORGETOWN L.J., Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993, at 836 (1994) Is this an overstatement requiring clarification by the Supreme Court? Other functions of a probable cause hearing are of sufficiently grave importance

that the "sole issue" viewpoint needs refocusing.

There are actually three discrete sources of rights of a warrantless arrestee at a probable cause hearing: (1) state laws; (2) Rule 5 of the Federal Rules of Criminal Procedure, and (3) federal constitutional law. Although a determination of probable cause is certainly the paramount function of the Gerstein hearing, it is crystal clear that in a hearing before a federal magistrate other considerations are highly important. Rule 5 of the Federal Rules of Criminal Procedure establishes procedures for the conduct of a federal hearing. The procedural checklist in Rule 5 raises questions whether, except in the most exigent circumstances, such a hearing can be conducted without the

arrestee present in person or by closed-circuit television equipment. Rule 5(a) provides that the arresting officer shall take "the arrested person" before a magistrate and that when such person "appears initially before the magistrate" the procedure follows the other applicable subdivisions of Rule 5. The magistrate must inform the suspect of certain rights: to remain silent, to retain an attorney, to avoid making statements that may be used against the arrestee, the right to a preliminary examination, to allow reasonable time to consult with an attorney, and finally, to the right to set or deny bail.

Where a state law criminal charge is involved, the usual source of rules for the conduct of the probable cause hearing is a state statute. The Illinois

statute, 725 ILCS 5/109-1, is very specific on the conduct of such a hearing. The complete text appears under the "Constitutional and Statutory Provisions Involved" portion of this Petition. Notably, closed-circuit television is provided for if the person arrested "...is in a different building than the building in which the judge is located..." There is one exception to the TV rule, which is that a hearing to deny bail may not be conducted by way of closed-circuit television.

The Supreme Court has held that a warrantless arrestee is not entitled to counsel at the probable cause hearing on the basis that it is not a "critical stage" of the prosecution at which the absence of counsel would significantly impair the defense on the merits. (Ger-

stein, 420 US at 122-23) But the Court has never so much as hinted that the permitted informality of such a hearing could trigger a deliberate or routine state policy of dispensing with the physical presence of the arrestee at the hearing. In addition to the Ninth Circuit in McLaughlin, two other federal circuits have held that the lack of a "face-to-face" appearance before a judicial officer does not make a probable cause hearing unconstitutional. King v. Jones, 824 F2d 324, 327 (4th Cir 1987); Blake v. Katter, 693 F2d 677, 681 (7th Cir 1982). It is submitted that these authorities need to be re-examined by the Supreme Court in the light of the McLaughlin "other extraordinary circumstance" rule.

Garcia, as a warrantless arrestee, was not subject to the Federal Rules of Criminal Procedure. The source of his rights are the Illinois statute on preliminary hearings. Secondarily, his rights are secured by federal constitutional law. Garcia charged that certain defendants combined to follow a policy that was either deliberate or in conscious disregard of his constitutional rights. He alleged that after remaining in a hospital handcuffed to his bed for five days he thereafter was transferred directly to Cook County Jail. At the probable cause hearing conducted in his absence, bail was denied him. Garcia claims that the conscious or deliberate adherence by governmental officers to a policy which ignores the clear mandates of a state statute amounts to an unconstitutional abuse of power under the

Fourteenth Amendment Due Process Clause and also the Fourth Amendment, as here where such abuse resulted in a prolonged detention after a probable cause hearing which violated state law. Alternatively, but more important from the standpoint of fundamental constitutional guarantees, Garcia claims that minimum constitutional standards require the physical presence of the person arrested without warrant at any probable cause hearing hearing held within 48 hours after the arrest absent exceptional circumstances. Under either alternative view, an action for a deliberate or constructively intentional deprivation by reason of governmental policy or custom is subject to challenge under 42 USC 1983. Garcia did not allege a negligent, random or unauthorized deprivation of a protected

interest, as in Parratt v. Taylor, 451 US 527, 101 SCt 1908, 68 LEd2d 420 (1981).

The Seventh Circuit in Garcia totally ignored the Illinois statute. The court cited Gerstein and the Ninth Circuit opinion in McLaughlin to conclude that Defendants Sheahan and English could not be responsible for not producing Garcia for the Gerstein hearing because he did not have to be present. Also driving the decision were the Seventh Circuit's line of authority in Wilkins v. May, 872 F2d 190 (7th Cir 1989), cert denied, 493 US 1026, 110 SCt 7733, 107 LEd2d 752 (1990) and Villanova v. Abrams, 972 F2d 792 (7th Cir 1992) These cases hold that after a Gerstein hearing, the Fourth Amendment ceases to apply and due process furnishes the only

standard. The holding in Garcia, unless clarified, could translate into state prosecutorial practices whereby arrestees are routinely absent for their own probable cause hearing. The imprimatur of Garcia signals state officials that there is really no downside to not having the arrestee present. In this respect the 'informality' and 'sole issue' language of the Supreme Court in Gerstein is seized upon by the lower federal courts as being infused with greater content than may have been intended.

What precise constitutional provision requires the physical presence of the accused at the probable cause hearing: is it the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment? Albright v. Oliver, __ US __,

114 SCt 807, 127 LEd2d 114 (1994) seems to have underscored the Fourth Amendment. True, this conclusion is inverse because Albright expressly waived reliance on the Fourth Amendment and on procedural due process and the Court narrowly held that substantive due process, on which Albright did rely, was inapplicable. Albright appears to smear the neat territorial boundryline of the rule surveyed by the Seventh Circuit in Wilkins and Villanova. Particularly so, when we consider that both these decisions predate the 'objective reasonableness' standard of Graham v. Connor, 490 US 386, 109 SCt 1865, 104 LEd2d 443 (1989). Garcia claims that his supposed Gerstein hearing is flawed by his nonappearance pursuant to governmental policy. The hearing itself was in violation of what should be part and

parcel of a guarantee from seizure secured under the Fourth Amendment. The hearing, if constitutionally improper, was a proximate cause of his entire extended detention, which Garcia expressly pleaded. Justice Ginsburg in a concurring opinion in Albright, emphasizes the "purposive and embracing" scope of the Fourth Amendment (111 SCt at 815) And the comment by Chief Justice Rehnquist in that same decision (114 SCt at 813) quoting his earlier writing in Graham v. Connor that a particular amendment's provision of an "explicit source of constitutional protection" is looked to rather than the "more generalized notion" of substantive due process seems like a signpost with an arrow on it pointing to the Fourth Amendment, at least in Garcia's case.

II. GARCIA'S CONTINUED DETENTION AFTER OBJECTIVE PROOF OF INNOCENCE IS A FOURTH AMENDMENT SEIZURE

Garcia's claims that his continued detention after the negative drug test report was made was unreasonable in duration and therefore unconstitutional. The dissent by Justice Cudahy in Garcia is adopted by Garcia as making all the relevant arguments which Garcia would make with the major exception of whether the Fourteenth Amendment is the relevant constitutional source. Based on the various analyses in Albright, it probably does not apply. Justice Powell in Gerstein wrote: "Both the standards and procedures for arrest and detention derive from the Fourth Amendment" (420 US at 111) At issue is Garcia's continuing detention after proof which makes it objectively impossible that he committed

the crime charged. As Justice Cudahy points out, citing Powe v. City of Chicago, 664 F2d 639 (7th Cir 1981); Gay v. Wall, 761 F2d 175 (4th Cir 1985); Sanders v. English, 950 F2d 1152 (5th Cir 1992) this is not a situation where Garcia charges the police authorities with failure to investigate further where facts cast doubt on the accused's innocence. Garcia was detained after the negative test which amounted to actual knowledge that it was objectively impossible for him to be guilty of the crime charged. Although Justice Cudahy views this as a due process violation, he points out, citing Graham v. Connor, that it should make no difference since the Fourth Amendment's prohibition against unreasonable seizures is coextensive with the Fourteenth Amendment's prohibitions against deprivations of

liberty without due process. Garcia's pleadings charged that his detention by reason of the drug testing delay, was done deliberately or with conscious indiffence and violated both Amendments. (R. 275-276) Garcia's situation was unlike that of Albright, who elected to proceed under substantive due process as a deliberate strategy, probably to avoid statute of limitations problems. Garcia in arguing that the Fourth Amendment is the more relevant choice, does not thereby intend to exclude the possiblity that a federal judge may fix instead on the Fourteenth Amendment. Garcia made no intentional waivers here.

III. SOME TYPE OF 'FIELD TEST' OF A SUBSTANCE THOUGHT TO BE ILLEGAL IS INDISPENASABLE TO A FINDING OF PROBABLE CAUSE

Garcia claims that some type of

reliable test should have been done at an early stage of his detention to determine whether the 'white powder' substance was illegal. Without Garcia's presence in court at the probable cause hearing, the judge decided probable cause on the basis of Officer Gall's sworn statement of a conclusory nature bereft of any facts. Garcia claims that some type of confirmatory test should have been done in the time period before the hearing, or even within a short time thereafter, in order to chemically validate the barebones conclusion with respect to what the white substance really was. Any type of a neutral, reasonably reliable test would do, perhaps even a blind taste or smell test by some person knowledgeable about dangerous drugs. Garcia pleaded the

existence of one inexpensive and easily available test. This did not mean to suggest that the police should be hogtied to only that one test.

Penninngton v. Hobson, 719 FSupp 770 (SD Ind 1989) shows the potential for police abuse of drug testing procedure. Simple aspirin was 'field tested' by police and said to be cocaine and on that basis a judge determined there was probable cause to detain Pennington pending further confirmatory tests. When the additional tests two months later found only aspirin, Pennington's later Section 1983 claim for money damages for the continued detention on the basis it violated the Fourth Amendment was upheld. Pennington affords a simple teaching. After a judge in a drug case finds probable cause based upon adequate

sworn facts, jurisdiction should be retained in that same court to allow confirmatory testing within a brief period of time. Five working days, for example. If the testing cannot be performed within the short extended time parameter, the police have an option. They can releae the detainee and rearrest him with a warrant after drug tests prove positive. Or they can detain the arrested person further on a gamble that the tests will be positive. If the gamble is lost, and the detainee, like Garcia, is innocent, the governmental authority responsible for the arrest can pay the detained person whatever damages are reasonable. Certainly the war on drugs is of paramount national importance. But it must not supply a pretextual nightstick to police to detain

persons whom the police deem undesirable when such persons turn out to be ordinary citizens innocent of the drug crime charged.

IV. THE CLAIMS AGAINST THE STATE'S ATTORNEY OF COOK COUNTY SHOULD BE REMANDED IF THIS COURT HOLDS THAT A PROBABLE CAUSE HEARING MUST INCLUDE THE APPEARANCE OF THE ACCUSED IN PERSON

Garcia claimed prospective relief and money damages from the State's Attorney. The District Court held that since Garcia was already released from jail when his action was filed, he could only be seeking retrospective monetary relief. (R. 231-232) The latter claim was dismissed on the basis that it was barred by the Eleventh Amendment. (R. 231-232) The Seventh Circuit affirmed on both points. If this Court reverses the

holding below on the Gerstein issue, then Garcia argues that the proposed Second Amended Complaint's claims against the State's Attorney should be remanded to the trial court for further consideration. And the claims against Sheahan and English should be remanded.

A. The claims for injunctive and declaratory relief

Must a plaintiff who may only be entitled to prospective injunctive relief, either individually or as a class representative, be subject to a current constitutional deprivation at the time suit is originally filed in order to sustain the class action? Some lower federal courts have held that the deprivation must subsist at the time of filing. Jones v. Takaki, 832 FSupp 1224 (ND Ill 1993)(improperly seized auto was

previously returned); and See Annotations at 33 ALR Fed 484 and 570. Garcia was subject to two years probation starting October 15, 1990 (R. 278) and the District Court dismissed the claims against Defendant O'Malley on December 23, 1991 (R. 236) So if Garcia were again arrested within the period of his probation without a warrant and subjected to the same type of Gerstein hearing outside his presence, his personal liberty would likely be threatened in the same manner as before. At the time his suit was originally commenced, however, he was no longer in custody. In his First Amended Complaint he requested only money damages from the State's Attorney. In his proposed Second Amended Complaint, leave to file it was denied, as the Seventh Circuit opinion accurate-

ly notes, on the basis that the Gerstein hearing was not unconstitutional for lack of his personal appearance, In that pleading Garcia requested not only money damages but declaratory and injunctive relief, attorneys fees and class action certification. (R 505-507) But if Garcia is unable to sue the State's Attorney for money damages on Eleventh Amendment grounds, then injunctive or declaratory relief is the remaining avenue.

In Gerstein, the Plaintiff class members filed their action while they were still incarcerated. Later they were convicted and so their pretrial detention ended. In footnote 11, the court stated that this fact "...does not moot the claims of the unnamed members of the class." Since "... other persons simi-

larly situated will be detained under the allegedly unconstitutional procedures" the claim is one that could be "capable of repetition, yet evading review." (420 US at 110) In McLaughlin the plaintiffs also sued while still incarcerated but all either received probable cause determinations or were released. The court held that obtaining class certifications after release from pretrial detention was sufficient to preserve jurisdiction. In such event the class action "relates back" to the original filing of the complaint. See, eg., Williams v. Schweiker, 541 FSupp 1360 (ED Mo 1982); Candy H. v. Redemption Ranch, Inc., 563 FSupp 505 (MD Ala 1983). The court in McLaughlin cited United States Parole Comm. v. Geraghty, 445 US 388, 100 SCt 1202, 63 LEd2d 479

(1980). The court there held that although class certification had been denied in the trial court, Geraghty, who sued while he was still incarcerated, retained a personal stake in obtaining class certification sufficient to assure that values under Article Three of the U.S. Constitution were retained. Thus if appeal results in reversal, and the class is subsequently certified, the merits of the class claim can be reached even if Geraghty's individual claim were moot.

The scope of this rule is still not clear if the lower federal courts interpret the rule as requiring the plaintiff to be subject to an unconstitutional act or omission at the time the action for injunctive relief is originally filed. Is that what the Supreme

Court intends? Garcia might be looked at as a person who, released from detention, was not entitled to maintain an equitable or declaratory action if a court determined that the threat of a similar future deprivation was not imminent. In upholding the rule against class certification mootness, McLaughlin emphasized the "inherently transitory" nature of some claims such that the trial court might not have sufficient time to rule on the claims before the proposed class representative's interest expires. (111 SCt at 1667) Surely the same volatile quality surrounds the arrestee who suddenly is thrust into the galley tier of a metropolitan prison system. The Seventh Circuit in its opinion said: (footnote 5, 24 F3d at 970) "If Garcia believed the City was

proceeding too slowly, he could have tested the substance himself by exercising his right to investigate." This idealistic comment is belied by the record: a public defender appointed without the demonstrated knowledge of Garcia and who knew Garcia was hospitalized the day after the arrest, who "had no opportunity to interview" Garcia, and who did not ask for such an opportunity during the hearing. (R. 278) Two days later in court a different public defender. (R. 281) These facts demonstrate a likelihood that Garcia had no meaningful opportunity while incarcerated to "investigate" anything, and certainly not to file suit during the 25 days he was in Cook County Jail after being transferred from the hospital. If he did not have a public defender who

would at least make an attempt to ask for a reconsideration of the probable cause finding and denial of bail contrary to the Illinois statute, he probably had no meaningful opportunity "to investigate" or do anything else during his jail time. Garcia submits that the "transitory" exception should be incrementally broadened by this court to apply to a declaratory action filed after a person arrested without a warrant is released from pretrial detention. And perhaps to injunctive relief sought as well.

B. Retrospective money damages

Will v. Michigan Department of State Police, 491 US 58, 109 SCt 2304, 105 LEd2d 45 (1989) held that the Eleventh Amendment shields a State from

Section 1983 liability for money damages where state officials were acting in their official capacity. This is true provided the damages were payable out of state funds. See also, Edelman v. Jordan, 415 US 651, 94 SCt 1347, 39 LEd2d 662 (1974); Morris v. Board of Education, 401 FSupp 188 (DC Del 1975); Seaman v. Spring Lake Park Independent School District, 387 FSupp 1168 (DC Minn 1974) Illinois law technically classifies the State's Attorney in each separate county as a state officer, at least for some purposes. Ingemunson v. Hedges, 133 Il12d 364, 549 NE2d 1269, 140 Il1Dec 397 (1990) But is any part of an award of damages against O'Malley in his official capacity actually paid by the State of Illinois? In the District Court Garcia claimed in a Memorandum of Law

that proof of the source of payment should be alleged by O'Malley as an affirmative defense, in the same manner as qualified immunity must be alleged as an affirmative defense in a a Section 1983 action. (R. 154-158) If this Court chooses to reverse on the Gerstein issue, Garcia asks that the remand include directions to the trial court to direct the State's Attorney to file an Affirmative Defense as to the source of payment of any Section 1983 money judgment against him in his official capacity. The trigger for this requirement is the prima facie proof by Garcia of unconstitutional policies and practices surrounding the probable cause hearing. Coupled with this is the lack of any clear indication in the Illinois sta-

tutes that the State of Illinois must pay all or any part of such damages.

In Santiago v. Daley, 726 FSupp 198 (ND Ill 1989) the court held that a Section 1983 action would lie against a former state's attorney for violation of the constitutional rights. The court held that Illinois law states sovereign immunity did not apply to the action against the State's Attorney in his official capacity. The basis of the decision was that the State's Attorney was a County and not a State employee. After the Illinois Supreme Court's decision in Ingemunson, the same district court reversed itself in Santiago v. Daley, 744 FSupp 845 (ND Ill 1990), based on the clear statement in Ingemunson that State's Attorneys are State officers under the language of the

Illinois Constitution. In the first Santiago opinion, the District Court observed that the countywide functions of such an official did not make such person an agent of the State. Nor did the payment by the State of two-thirds of that official's salary, any more than if the State voluntarily decided to reimburse or indemnify such an official against Section 1983 liability. (726 FSupp at 200) Montgomery v. Illinois, 21 Ill Ct Cl 205 (1952) held that a State's Attorney was not an agent of the state for purposes of vicarious liability of the state for any wrongful act by the State's Attorney. Stokes v. City of Chicago, 660 FSupp 1459 (MD Ill 1987) held that State's Attorneys were judicial officers and not county officials and that the county could not be held

responsible for the allegedly unconstitutional act of an assistant state's attorney. Illinois decisional law seems to clearly hold that a State's Attorney, as an elected county official, is the surrogate of neither the State nor the county of his election.

The Illinois system with respect to State's Attorneys is complicated. In counties of 3,000,000 or more population, the State's Attorneys office is entitled to collect fees for the work done (55 ILCS 5/4-2002.1) The State pays roughly one-third of the salary of a State's Attorney (55 ILCS 5/4-2001). The salaries of Assistant State's Attorneys are fixed by the State's Attorney, subject to budgetary limitations established by the county board and paid out of the "general corporate fund" of the

county treasury (55 ILCS 5/4-2003, 2005). There are provisions allowing for indemnification of up to $500,000 by the county of any sheriff of deputy, or any public defender or assistant public defender, for "any injury to the person or property of another" except where the injury results from "willful conduct" (55 ILCS 5/5-1002, 1003). Presumably this is beause no agency relationship exists as between the county and these particular offices. There is no statute in the State of Illinois, however, which requires either the State or County to indemnify the State's Attorney's office under similar circumstances. Cook County adopts an annual budget for the State's Attorney's office, contained in a document entitled "Cook County Illinois Board of Commissioners The Annual

Appropriation Bill for the Fiscal Year 1991" within which is contained "Fund Class 250-811." The entitlement of this fund is: "Contingent expenses for the State's Attorney for use of the State's Attorney (in addition to expenses otherwise provided for) The State's Attorney shall render a final account to the County Board and return any surplus remaining in his hands to the County Treasurer---excluding personal allowances.....$300,0000" (page 314 of Appropriations Bill). Thus any judgment against a State's Attorney of Cook County in his official capacity under Section 1983 is most likely paid out of this fund. At this time, the actual source of payment for such a judgment is a question of fact, until such time as counsel for the State's Attorney admits

that the State is not the source of any such payment.

Imbler v. Pachtman, 424 US 409, 96 SCt 984, 47 LEd2d 128 (1976) held that a state prosecutor, acting within the scope of his duties in initiating and prosecuting a criminal case, was absolutely immune from liability for damages under Section 1983. In that case, plaintiff's only claim was that the prosecuting attorney knowingly or negligently used false evidence and suppressed material evidence at the criminal trial. The Supreme Court however, noted that it was leaving open the question whether similar reasons require immunity for those aspects of a prosecutor's responsibility which cast such person in the role of an administrator or investigative officer rather than the

quasi-judicial role of advocate. Garcia claims that the alleged unconstitutional policy of the State's Attorney's office, although it had an immediate impact on the criminal prosecution of Garcia, was basically an administrative policy which is essentially quite different from the prosecutorial misconduct immunized in Imbler. GARCIA submits that the deliberate adoption of or conscious adherence to a policy which does not consist with the U. S. Constitution should not be immunized under the Imbler rule.

In summary, this appeal presents unusual questions regarding the extent to which a State's Attorney is subject to any kind of action by a person in Garcia's position. It is submitted, however, that the Supreme Court should not reach the issue of whether O'Malley

has immunity from a suit for money damages. This aspect of the case should be remanded to the trial court for a finding of fact with respect to the source of funds for payment of any judgment against O'Malley in his official capacity. In this respect, the question of O'Malley's immunity is not yet ripe for decision.

CONCLUSION

Garcia asks that this Court reverse the holdings below that (1) a probable cause hearing does not require the personal appearance of the warrantless arrestee; (2) Garcia's continued detention after objective proof of innocence constitutes a seizure; and (3) the lack of any confirmatory chemical test soon after the arrest, and within a short

time after the probable cause hearing is indispensable to a valid finding of probable cause. If the Court reverses on the first point, then the Court is requested to remand the claims against the State's Attorney with directions that the District Court direct the State's Attorney to file an affirmative defense alleging the source of payment of any potential money judgment against him, and further, to remand with directions to allow the filing of the claims against O'Malley, Sheahan and English embodied in the Second Amended Complaint. If the Court reverses on either point 2 or 3 above, remand is requested to include directions to reinstate the

appropriate Counts of the Third Amended Complaint against the City of Chicago.

Respectfully submitted,

JOHN BERNARD CASHION
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-4090

RAFAEL GARCIA,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, ILLINOIS, ANNA GALL, COUNTY OF COOK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5535—**William T. Hart,** *Judge.*

ARGUED NOVEMBER 2, 1993—DECIDED MAY 19, 1994

Before WOOD, JR., CUDAHY, and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* On March 15, 1991, Chicago Police Officer Anna Gall arrested Rafael Garcia, who at the time was on probation for two felonies and had an outstanding bond forfeiture warrant, for possession of a controlled substance. Officer Gall had discovered by Garcia's feet a plastic bag containing a white, powdery substance, but did not test the substance before making the arrest. In the process of arresting Garcia, Gall struck him in the head with her flashlight,[1] and the police took Gar-

[1] Garcia settled for $25,000 a claim against Gall based on her use of excessive force, and that claim is not at issue in this appeal.

cia to St. Mary of Nazareth Hospital for treatment of his injuries. The next day a hearing took place in the Circuit Court of Cook County (the *Gerstein* hearing)[2] to determine whether probable cause existed to detain Garcia.

At that time, Garcia remained hospitalized under twenty-four hour guard and therefore was unable to attend the *Gerstein* hearing.[3] Instead, a Public Defender represented Garcia at the hearing and asked for reasonable bond on his behalf. The prosecutor petitioned the court to issue a warrant and set bail for Garcia's violation of probation. The court found probable cause to detain Garcia, and set his bond for violating probation and possessing a controlled substance.

On March 18, while Garcia remained hospitalized, the court set a preliminary hearing for April 10. St. Mary of Nazareth Hospital released Garcia on March 20, and personnel from the Sheriff's office immediately placed Garcia, who did not make bond, in custody at the Cook County Jail. On March 26, the Chicago Police Department laboratory tested the powder and found it to be negative for any controlled substances. The laboratory communicated that information to the State's Attorney's office, and at the preliminary hearing on April 10, Judge Mary Maxwell Thomas granted the prosecutor's request for a *nolle prosequi*. On April 12, the court reinstated Garcia's probation status. Cook County Jail released Garcia on April 15.

Garcia then filed this lawsuit for money damages in the District Court for the Northern District of Illinois. Garcia's first amended complaint named as defendants Officer Gall, the City of Chicago, the Cook County Department

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[2] *Gerstein v. Pugh* held that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention," 420 U.S. 103, 126 (1975), and probable cause hearings that take place after arrests made without warrants commonly are referred to as *Gerstein* hearings.

[3] Garcia spent approximately five days in the hospital.

of Corrections, Director of the Cook County Department of Corrections C. Richard English, Cook County State's Attorney Jack O'Malley, and Cook County Sheriff Michael F. Sheahan. Garcia claimed that: (1) the *Gerstein* hearing was inadequate because he was not brought before the judge, due to his hospitalization; (2) Gall used excessive force against him and did not have probable cause to arrest him; (3) O'Malley, Sheahan, and English were responsible for detaining him without probable cause; and (4) the City of Chicago's procedures for testing substances seized as narcotics were constitutionally inadequate. All defendants filed dispositive motions in response to Garcia's complaint.

The district court dismissed State's Attorney O'Malley and the Cook County Department of Corrections based on Eleventh Amendment immunity from civil liability, and dismissed all of Garcia's *Gerstein* claims; the court did not dismiss Sheriff Sheahan and Director English because that issue was not before the court. Garcia then filed a motion to reconsider, as well as a motion to file a second amended complaint that in essence repeated the *Gerstein* claims from the first amended complaint. Sheahan and English filed a motion for summary judgment. The district court denied both of Garcia's motions, and dismissed Sheahan and English.

Garcia then filed a motion to file a third amended complaint, which included new claims against the City of Chicago and Officer Gall, but included none of the other defendants. The district court granted the motion, and the City of Chicago and Gall moved to dismiss counts three through six of the complaint, which the district court granted. Counts I and II, for excessive force and false arrest, named only Gall as the defendant. Gall and Garcia settled those claims for $25,000, and Garcia reserved the right to appeal earlier rulings of the district court. Garcia now appeals from the dismissals of O'Malley, Sheahan, and English, the denial of leave to file his second amended complaint, and the dismissals of the fifth and sixth counts of his third amended complaint, which alleged

that the City's procedures for testing substances to determine if they are controlled were constitutionally deficient.

A. Defendant O'Malley

The Eleventh Amendment prohibits federal courts from deciding suits brought by private litigants against states or their agencies, and that prohibition extends to state officials acting in their official capacities. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Whether a particular official is the legal equivalent of the State itself is a question of that State's law, *Santiago v. Daley*, 744 F. Supp. 845, 845 & n.1 (N.D. Ill. 1990), and the Illinois Supreme Court decided in 1990 that State's Attorneys are state officials. *Ingemunson v. Hedges*, 549 N.E.2d 1269, 1272 (Ill. 1990) (State's Attorneys are state, not county, officials); *see also Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992) (those who prosecute cases ~~pursuant~~ to state statute are state officials for the purposes of constitutional liability); *Santiago*, 744 F. Supp. at 845-46. Because O'Malley was acting in his official capacity as Cook County State's Attorney, Garcia cannot recover money damages from him.

Garcia does argue that he is entitled to injunctive relief from O'Malley, and the Eleventh Amendment provides no shield against such requests. *Will*, 491 U.S. at 71. When Garcia requested injunctive relief in his second amended complaint, however, Cook County jail had already released him from their custody, and Garcia alleged no facts to show that he was in danger of being arrested in the future and detained in a similar manner. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (no standing to seek injunction if not in danger of being arrested and subjected to future mistreatment). Thus, the district court correctly dismissed O'Malley.

B. The *Gerstein* Claims

Garcia's only claims for relief against defendants Sheahan and English relate to his inability to be present at

the probable cause hearing held the day after Officer Gall arrested him. Garcia also named the City of Chicago and Cook County in those claims.[4] The Fourth Amendment, however, does not require that probable cause hearings be adversarial in nature, *Gerstein v. Pugh*, 420 U.S. 103, 121-22 (1975); the Fourth Amendment allows the issuance of warrants in the absence of the arrestees, and its scope does not expand for probable cause determinations that take place after arrests. *Id.* at 120; *see also McLaughlin v. County of Riverside*, 888 F.2d 1276 (9th Cir. 1989) ("Those arrested with a warrant have not attended the probable cause determination made before issuance of the warrant. We perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right."). The record in this case demonstrates that Garcia, who never contended that he was physically capable of leaving the hospital, received a timely and constitutionally sufficient probable cause hearing in which an attorney represented Garcia without objection by Garcia. The district court therefore correctly dismissed the City of Chicago, Cook County, Sheahan, and English notwithstanding Garcia's inability to attend the hearing.

C. The Second Amended Complaint

We must ask whether the district court abused its discretion when it denied Garcia leave to amend his complaint. *See Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir.

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[4] Garcia failed to specify in his notice of appeal that he was appealing the dismissal of the *Gerstein* claims against the City of Chicago as Federal Rule of Appellate Procedure 3(c) requires. That failure is jurisdictional, *see Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and we therefore cannot consider the appeal of the *Gerstein* claims as applied to the City of Chicago. Additionally, Garcia expressly waived his right to raise any *Gerstein* claims against the City in his settlement agreement with Officer Gall and the City. The importance of these points, however, is minimized by the fact that, as the district court explained, Garcia's *Gerstein* claims lacked any merit.

1992). A district court does not abuse its discretion in denying leave to amend if the proposed repleading would be futile, *DeSalle v. Wright*, 969 F.2d 273, 278 (7th Cir. 1992), and futile repleadings include restating the same facts using different language, *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir. 1983), reasserting claims previously determined, *id.*, failing to state a valid theory of liability, *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979), and the inability to survive a motion to dismiss, *Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir. 1985).

Garcia's second amended complaint reiterated his excessive force and Fourth Amendment claims against the City of Chicago and Officer Gall, and restated the *Gerstein* claims the district court had dismissed previously. The district court reasoned that because the second amended complaint stated no new claims, it was futile, and the district court therefore denied Garcia leave to amend his complaint. That decision, far from being an abuse of discretion, stood on firm legal ground.

D. The Fourth and Fourteenth Amendment Claims

Garcia argues that the Fourth Amendment requires that police officers perform tests on substances believed to be illegal drugs immediately at a police station, rather than ten to twenty days after arrests at a crime lab, as the City of Chicago did after Garcia's arrest. Nevertheless, Garcia concedes that finding a white powder in a person's possession provides probable cause to arrest that person for possession of cocaine. *See United States v. Potter*, 895 F.2d 1231, 1234 & n.1 (9th Cir), *cert. denied*, 497 U.S. 1008 (1990). As we consistently have held, "once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989).

Garcia has suggested that the cobalt thiocyanate spot test is a superior, quicker means of determining whether a substance is cocaine. Perhaps he is correct, but what is wise practice and what is constitutionally compulsory are two very different concepts. *See Gramenos v. Jewel Cos.*, 797 F.2d 432, 442 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987). The City of Chicago is entitled to weigh the costs and benefits of available testing options and make its choice, and federal courts should be reluctant to second-guess such policy decisions. Garcia has articulated no reason why a twenty day period of time for testing a substance believed upon probable cause to be cocaine is constitutionally deficient, nor can we fathom why it would be.[5]

Garcia also contends that the City held him in custody in violation of the Fourth and Fourteenth Amendments after it discovered that the powder in question was not a controlled substance.[6] Garcia, however, was on probation before his arrest by Officer Gall, his probation was revoked subsequent to the arrest. The City legitimately held Garcia in custody until April 12, when the court reinstated Garcia's probation. *See Thompson v. Duke*, 882

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[5] If Garcia believed the City was proceeding too slowly, he could have tested the substance himself by exercising his right to investigate. *See U.S. Const.* amend VI (Compulsory Process Clause); Ill. S. Ct. R. 412(a)(v).

[6] Because the seizure of a person ends after the *Gerstein* hearing, the Due Process Clause of the Fourteenth Amendment is the only applicable constitutional provision. *See Wilkins v. May*, 872 F.2d 190, 193 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990). The recent Supreme Court decision of *Albright v. Oliver*, 114 S. Ct. 807 (1994), casts considerable doubt on the applicability of substantive due process as well. *See id.* at 814 (Scalia, J., concurring) ("But here there was no criminal sentence (the indictment was dismissed), and so the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest. I think it unlikely that the procedures constitutionally "due," with regard to an arrest, consist of anything more than what the Fourth Amendment specifies.").

F.2d 1180, 1187 (7th Cir. 1989) ("We note that dismissal of the charges underlying a parole violation warrant has been found of no consequence in the state's determination of a parole violation.") (citations omitted). Although undue delay in making a decision regarding reinstatement of probation might in some instances rise to the level of a deprivation of constitutionally guaranteed rights, *United States v. Scott*, 850 F.2d 316, 319 (7th Cir. 1988),[7] Garcia did not make any arguments regarding reinstatement of his probation.

Instead, Garcia cites *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986), *Davis v. Kirby*, 755 F. Supp. 199, 201 (N.D. Ill. 1990), and *People v. Quarles*, 410 N.E.2d 497 (Ill. App. Ct. 1980), for the proposition that the City was constitutionally obligated to release him as soon as it discovered that Garcia was not in possession of a controlled substance, but none of those cases hold as Garcia indicates. *BeVier*, *Davis*, and *Quarles* all involved the dissipation of probable cause *before* a judicial determination of probable cause (and in *BeVier* and *Davis*, probable cause never existed at all). Once a judge makes a probable cause determination at a *Gerstein* hearing, as happened here, that determination is sufficient to bring the case to trial. *Gerstein*, 420 U.S. at 119-24.

What happens when the prosecutor discovers exculpatory evidence after a probable cause determination at a *Gerstein* hearing? Not all exculpatory evidence irrefutably

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[7] In *Scott*, this court adopted a three factor test to determine whether a revocation hearing was not reasonably prompt: "the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Scott*, 850 F.2d at 319, quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Here, Garcia was not prejudiced by the delay, as his probation was reinstated in less than three weeks. *See Scott*, 850 F.2d at 321 (13 month delay not prejudicial when no evidence of how delay impaired defense at revocation hearing exists). Additionally, Garcia never asserted his right to a reasonably prompt revocation hearing. Our holding that Garcia properly was held in custody until after the preliminary hearing is well within *Scott*.

proves the defendant's innocence. The decision to move for *nolle prosequi* is a matter of prosecutorial discretion, and the prosecutor can proceed to trial if the prosecutor believes doing so is warranted. In this case, in fact, the prosecutor *did* dismiss the case well before trial, at the preliminary hearing—Garcia just contends that the delay from March 26 until April 10, the date the court set for his preliminary hearing, was too lengthy. The Due Process Clause, however, does not compel prosecutors to dismiss its cases before trial based on exculpatory evidence in its possession, much less compel them to do so within fifteen days. *See Albright v. Oliver*, 114 S. Ct. 807, 813 (1994) (quoting *Gerstein* for the proposition that the accused is not "entitled to judicial oversight or review of the decision to prosecute.").

Of course, if the prosecutor fails to deliver exculpatory evidence to the defendant before trial, it may run afoul of *Brady v. Maryland*, 373 U.S. 83 (1963). If the trial is too long in coming, a Sixth Amendment speedy trial problem may arise. *See Doggett v. United States*, 112 S. Ct. 2686, 2692-94 (1992). Garcia, however, raises neither a *Brady* nor a Speedy Trial claim (nor do either problems exist here). The prosecutor, confronted with strong exculpatory evidence, properly decided to move for a *nolle prosequi* at the preliminary hearing rather than wait until trial. Garcia's right to due process of law was satisfied.[8]

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[8] We are somewhat puzzled as to why Garcia was not released until April 15, 1991, given that the prosecutor entered a *nolle prosequi* on April 10, and that Garcia's probation was reinstated on April 12. Perhaps this was due in part to the weekend that fell on April 13-14, 1991, or to administrative inefficiencies. Obviously, holding a person in jail for several days who does not belong there might rise to the level of a constitutional violation. Nevertheless, nothing in the record suggests that Garcia's attorney ever brought Garcia's continued confinement to the attention of the court, nor is there any indication that Garcia himself ever made an effort to contact the court, his attorney, or an administrator in the Cook County Jail.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the majority's able analysis and disposition of all the issues save one. I have difficulty, however, with the approach to the City's delayed drug testing and egregiously slow application of the negative test results. Garcia alleges that the City's policy caused him to be detained for the 11 days it took the white powder to be tested for drugs, and for 15 more days after the tests came back negative. Because I think that such a policy may implicate Garcia's Fourteenth Amendment due process rights, I would not dismiss this claim at the early stage of a 12(b)(6) motion. Whether the City policy actually caused Garcia's detention and whether it is reasonable are issues requiring further proceedings. The waters are muddied somewhat by the fact that Garcia was on probation for an auto theft offense at the time of his arrest. At the *Gerstein* hearing, the state's attorney was granted leave to file a violation of probation report, although, contrary to the majority's assumption, Garcia's probation was never actually revoked.[1] But neither the parties, the district court nor the majority have scrutinized this case through the probation lens. Significantly, the City never contended that Garcia's detention was based on his alleged probation violation, nor does it argue that either his liberty interest or his due process rights are limited due to his probation status. Nor does the majority's analysis hinge on Garcia's status as a probationer. Because the case has proceeded along these lines, I find it useful to

[1] Probation may be revoked only after a full hearing that includes notice of the alleged violation, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses and a written report. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *see also* 730 ILCS 5/5-6-4 (revocation hearing must occur within a reasonable time). There is no evidence that Garcia received such a hearing. At the April 12 hearing after the prosecutors nolle prossed the charges against Garcia, the court restored (as opposed to reinstated) probation, noting that it had never been terminated.

examine first Garcia's detention claim without reference to his probation status.

It is significant that the district court did not dismiss Garcia's due process claim for failure to allege a constitutional violation. Instead, the court found that "conduct that results in unreasonable, unnecessary and unjustified delays in processing and releasing arrestees violates the Constitution if done intentionally or with deliberate indifference to the rights of arrestees." And the district court concluded that for purposes of a motion to dismiss, it must be presumed that 10 to 20 days is an unreasonable testing delay. But the court eventually dismissed the claim for failing to allege municipal liability with heightened specificity, an approach since invalidated by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993). I believe, however, that the district court was correct in its analysis of the problem—preliminary to its consideration of the pleading question.

Garcia's objection to the City's policy is essentially a challenge to extended pre-trial detention. The majority reasons that after a *Gerstein* hearing the speedy trial guarantee is the only limitation on subsequent prolonged pre-trial detention. This is cold comfort—the Constitution permits a trial months or even years after an arrest. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 536 (1972) (delay of over four years is constitutional). Moreover, I am skeptical about the majority's implicit conclusion that a *Gerstein* hearing bestows a constitutional blessing on *all* subsequent prolonged detention.

In *Baker v. McCollan*, 443 U.S. 137 (1979), the Supreme Court suggested that prolonged pre-trial detention, pursuant to a valid warrant and a judicial determination of probable cause, may violate due process. *Id.* at 145. *Baker* found no constitutional violation where the plaintiff was arrested and detained for three days over a holiday before the authorities realized they had arrested the wrong man. Although the speedy trial guarantee ensured that someone could not be detained indefinitely, the Court observed that

continued detention "in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law." *Id.* However, the Court was "quite sure that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation." *Id.*

On the other hand, *Baker* also rejected a requirement that law enforcement officials exercise "due diligence" to determine whether the person detained is in fact innocent, holding that officials need not "investigate independently every claim of innocence." 443 U.S. at 146; *see also Thompson v. Duke*, 882 F.2d 1180, 1186 (7th Cir. 1989), *cert. denied* 495 U.S. 929 (1990); *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). The government here, of course, argues that *Baker* forecloses any challenge to the City's policy of delayed drug testing or of delayed reaction to the results of the drug tests.

But *Baker*, by its own admission, is not absolute. Since *Baker*, courts have found that prolonged pre-trial detention without any investigation can constitute a deprivation of liberty without due process. In *Johnson v. City of Chicago*, 711 F. Supp. 1465 (N.D. Ill. 1989), for example, the court found that a 6-day detention violated due process when the police did not take "even minimal steps" to evaluate the detainee's claims of innocence. *Id.* at 1470. Significantly, Johnson was arrested pursuant to a valid warrant (unfortunately intended for another Johnson, an Attica escapee) and brought before a judge for a first appearance; nonetheless, the court found that due process required more. *Id.* Similarly, in *Patton v. Przybylski*, 822 F.2d 697 (7th Cir. 1987), "an innocent person was allowed to languish in jail for almost a week; and to arrest a person over his vigorous protest that he is the wrong man . . . and keep him in jail for this period without either investigating the case or bringing him before a magistrate raises serious constitutional questions, under the . . . due process clause." *Id.* at 700-01. In *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985), where the plaintiff was detained

pursuant to a valid warrant for 18 days despite his protests of innocence, we held that "*Baker* supports, if not requires, our conclusion that plaintiff's 18-day detention was a violation of liberty without due process of law." *Id.* at 724. *See also Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir.), *cert. denied* 484 U.S. 855 (1987) ("prolonged confinement of an arrested person without a hearing to determine whether he is the person named in the warrant would be a deprivation of liberty without due process of law and thus violate the Fourteenth Amendment").[2]

Baker does not, then, preclude us from finding that the constitutionality of pre-trial detention may be questioned if the authorities deliberately ignore *all* indications that

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[2] These cases all rely, to some degree, on the fact that the detainees were not brought before a magistrate to present their claims of innocence. But although Garcia received a *Gerstein* hearing, it is by no means clear that this alone renders these cases inapplicable. A *Gerstein* hearing *follows* a warrantless arrest, and essentially replaces the probable cause determination that otherwise precedes issuance of an arrest warrant, *Gerstein*, 420 U.S. at 120; hence adversary safeguards, such as the right to be present at the hearing, are absent. *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated and remanded on other grounds*, 500 U.S. 44 (1991). But all defendants, whether arrested pursuant to a warrant or not, are usually afforded an opportunity under state law (e.g. 725 ILCS 5/109-1) or under Fed. R. Crim. P. 5(a) to be presented to a magistrate soon after arrest. Since the defendants in *Coleman* and *Patton* were arrested pursuant to warrants, it is, in part, the absence of this "first appearance" that rendered their detention unconstitutional. *Coleman*, 754 F.2d at 723-24; *Patton*, 822 F.2d at 701. But I am skeptical whether the *Coleman* or *Patton* courts would have considered due process satisfied if the defendants in those cases had not themselves been brought to court nor been represented by counsel who knew about their claim of mistake. The results might have been different if a judge had only read the police affidavits and ruled that the defendants could remain in detention. The latter is, essentially, the process that Garcia received. While this process comports with the requirements of *Gerstein*, it is far from clear that it is the equivalent of the hearing we have required as a prerequisite to extended pre-trial detention in *Coleman* or *Patton*.

the detainee is innocent. We should not, therefore, hold as a matter of law that the City's failure to determine whether a suspect was carrying *any* drugs for 11 days cannot implicate due process.

But whatever haziness obscures the exact contours of a duty to investigate burns off once the authorities *know* that they have no basis for detention. *Baker* only permitted pre-trial detention after a valid arrest pursuant to a valid warrant "*until* it was discovered that [the detainee] was not the person sought." *Powe v. City of Chicago*, 664 F.2d 639, 651-52 (7th Cir. 1981) (emphasis in original). *Baker* and its progeny did not involve "actual knowledge of the defendant's innocence, but rather the failure to take affirmative steps to determine his innocence." *Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *see also Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992). Here, after March 26, the City had tested the white powder and knew that it contained no drugs. Absent *any* other basis for suspicion—and at this stage we must assume there was none other than probation violation concerns—Garcia's extended detention at least presumptively violates the due process clause. *See e.g. Powe*, 664 F.2d at 651-52; *Gay v. Wall*, 761 F.2d at 179; *Pennington v. Hobson*, 719 F. Supp. 760 (S.D. Ind. 1989). As far as we can tell, the balance of incriminating evidence did not merely shift; there simply was no incriminating evidence. The situation was exactly as if the authorities had found that they had arrested the wrong person. *See, e.g., Patton*, 822 F.2d at 700-01; *Powe*, 664 F.2d at 651. In those circumstances—when the law enforcement officers know there is *no* hint of wrongdoing—continued pre-trial detention cannot be justified.

Richmond, Indiana had a drug testing policy that resulted in a similar prolonged detention that the district court found unconstitutional in *Pennington v. Hobson*, 719 F. Supp. at 770-72. Pennington was found with a packet of white powder, which a field test indicated was cocaine. A state court determined there was probable cause to detain Pennington pending confirmation of the field test.

Confirmation took two months since the police officer responsible for transporting drugs to the state lab took only one trip each month and had just returned from that month's trip. The white powder turned out to be aspirin after all, but Pennington was kept in jail for another month after the test results came back. *Id.* at 763-64. Like Garcia, Pennington brought a § 1983 claim alleging that the testing policy resulted in an unlawful detention. The district court concluded that although the police were not required to confirm their positive field test sooner than they did, the continued detention after the tests proved negative violated the Fourteenth Amendment. *Id.* at 771. The court denied the police officers' claim of qualified immunity, finding that "reasonable police officers [were] on notice that the Constitution proscribed intentional deprivations of liberty in the face of clearly exculpatory evidence." *Id.*

The Fifth Circuit also recently concluded that detention without investigation could be unconstitutional. *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992). Sanders was arrested pursuant to a valid warrant and detained for about 50 days. The police officer did not follow up on the significant leads suggesting that he was innocent. *Id.* at 1156-57. The Fifth Circuit held that Sanders' § 1983 claim alleging a due process violation survived dismissal since "a fact-finder reasonably could conclude that Lt. McCoy deliberately looked the other way in the face of exonerative evidence indicating that he had arrested the wrong man. . . . *Baker* imposes no impediment to Sanders' claim because the thrust of his contention is not that Lt. McCoy failed to take affirmative steps to investigate Sanders' innocence, but rather, that Lt. McCoy failed to release him even after he knew (or should have known) that Sanders had been misidentified." *Id.* at 1162.

In the Fourth Amendment context, if the evidence that forms probable cause for a warrantless arrest dissipates before the arrestee is brought before a judge, continued detention is unconstitutional. *Sivard v. Pulaski County*, 959 F.2d 662 (7th Cir. 1992), *remanded and affirmed on*

other grounds, 17 F.3d 185 (7th Cir. 1994), held that a plaintiff had stated a due process claim when the "sheriff . . . knew of his wrongful detention and continued to detain him in spite of that knowledge." *Id.* at 668. The same principle should apply in the due process context when the *sole basis* for detention has evaporated. Of course, it remains to be seen in the course of developing the facts to what extent the City's policy contributed to Garcia's continued detention. But since his detention presumptively violated his due process rights, I would not dismiss the matter at this stage.

Garcia has also challenged the City's policy as objectively unreasonable under the Fourth Amendment. As the majority noted, this circuit has a line of cases stating that after a Gerstein hearing, the Fourth Amendment ceases to apply and due process furnishes the only standard. *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990); *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992). Although I agree that these cases preclude consideration of Garcia's Fourth Amendment claim, the Supreme Court's recent decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), potentially blurs the bright line we have drawn. Albright was arrested for selling look-alike drugs. He was bound over for trial at a preliminary hearing (although not imprisoned), and the charges against him were eventually dismissed. *Id.* at 810. The Court was presented with the narrow question whether Albright could maintain a § 1983 claim for malicious prosecution on substantive due process grounds. *Id.* at 812. A plurality of the court held that there is no substantive due process right to be free from malicious prosecution. Rather, any such claim should be brought under the Fourth Amendment (although the court noted that Albright had not challenged his treatment on procedural due process grounds either). *Id.* Justice Ginsburg, who joined the plurality, wrote separately to explain her reasons for considering the case under the Fourth Amendment: "Albright may have feared that courts would narrowly define the Fourth Amendment's key term 'seizure' so as to deny full scope

to his claim. In particular, he may have anticipated a holding that the 'seizure' of his person ended when he was released from custody on bond. . . . Such a concern might have stemmed from Seventh Circuit precedent set before *Graham v. Connor*, 490 U.S. 386 (1989). *See Wilkins v. May*, 872 F.2d 190, 195 (1989) (substantive due process 'shock the conscience' standard, not the Fourth Amendment, applies to brutal 'post-arrest pre-charge' interrogation)." *Id.* at 815 & n.2. The Ginsburg opinion further observes that the Fourth Amendment continues to apply even after an initial bond hearing and release on custody, since the defendant remains " 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Id.* at 816.

Since, however, the Court's statements about the applicability of the Fourth Amendment are essentially only dicta in an otherwise narrow substantive due process case, I have difficulty concluding that they revive Garcia's Fourth Amendment claim. In any event, it probably makes little difference here, since the Fourth Amendment's prohibition against "unreasonable" seizures is co-extensive with the Fourteenth Amendment's prohibition against deprivations of liberty without due process. *Id.* at 829, n.24 (Blackmun, J., dissenting).

No party has suggested that Garcia's claim with respect to pre-trial detention has been affected by his status as a probationer. Nor did the district court consider this germane to the issues presented here. I therefore do not think the issue is properly before us. Even if it were, I do not think that Garcia's probation status would significantly affect the analysis of this case. Once the essential basis for probation revocation—a probation violation—had disappeared, there was no justification for denying even a probationer's minimal liberty interest.[3] *See, e.g., Douglas*

[3] Of course, a probation violation may exist where no crime has been committed. *See, e.g., Thompson v. Duke*, 882 F.2d at 1187 (three day delay in conducting parole revocation hearing was con-

(Footnote continued on following page)

v. Buder, 412 U.S. 430, 432 (1973) ("we conclude that the finding that petitioner had violated the conditions of his probation . . . was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Gagnon v. Scarpelli*, 411 U.S. at 781-82 (due process applies to probation revocation).

On a final note, the majority observes that Garcia was detained for an additional five days after the charges against him were nolle prossed, or three days after probation had been restored. Inexplicably, Garcia does not appear to challenge this period of detention. I mention this fact only to underscore my view that such arbitrary detention—when a person is neither suspected, arrested, charged nor convicted of any crime or wrongdoing—is clearly unconstitutional.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] *continued*
stitutional when there were reasons to suspect parole had been violated). We do not know, again in great part because the probation revocation question has never been presented in this case, whether after the drug testing there remained any basis on which to conclude that Garcia had violated a condition of his probation. We also do not have the benefit of the district court's consideration of the factors set forth in *United States v. Scott*, 850 F.2d 316, 319 (7th Cir. 1988).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 15, 1994

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

No. 92-4090)

RAFAEL GARCIA,
Plaintiff-Appellant,

v.

CITY OF CHICAGO, ILLINOIS, ANNA GALL, COUNTY OF COOK, et al.
Defendants-Appellees.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant on June 6, 1994, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby, DENIED.